APPEAL NO. 93116

On December 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue heard was whether the claimant, Mr L., who is the appellant in this appeal, continued to have disability as a result of a compensable injury, for the period from (date of injury) until May 12, 1992. The claimant was injured at his school, where he worked as a reading teacher, on December 9, 1991, when he broke up a fight between students. The employer was (employer), a self-insured governmental entity. He returned to work January 13, 1992, and worked until he retired on (date of injury). The hearing officer determined that the claimant did not have disability after (date of injury), due to his injury, because he left work voluntarily.

The claimant has appealed for these reasons: 1) he asserts that the hearing officer ignored a recited agreement between the parties in reaching his decision; 2) he was not informed until after the hearing started that he had a right to an attorney; 3) there appeared to be a personal relationship between the hearing officer and the attorney for the carrier, both of whom were Anglo-American, resulting in bias against the claimant; 4) that certain findings of fact are inconsistent with the evidence presented; and, 5) that the decision goes against the recommendations of the employer's personnel office and the Benefit Review Officer. The claimant also asserts that returning him to full duty as a reading teacher was against the employer's policy and resulted in further injury (although the extent of such further injury is not described on the appeal, nor was it asserted in the proceedings below). He also argues that one of the carrier's exhibits was fraudulent. The carrier responds that the decision of the hearing officer is supported by the evidence and should be upheld.

DECISION

After reviewing the record, we affirm the decision of the hearing officer.

Very briefly, claimant was injured when he broke up a fight between students on December 9, 1991, while employed as a reading teacher for the employer. According to an initial medical report in evidence, he was treated for dorsal thoracic strain/sprain, and shoulder strain/sprain. He returned to work on January 13, 1992, under a limited release. According to his principal, (Ms. K), he resumed teaching duties based upon her assessment that he could do that job even under a limited release.

Ms. K stated that she had discussed with claimant, beginning August or September 1991, and continuing at various times thereafter, his desire to retire. The claimant agreed that he considered retirement. Pursuant to this, a retirement party was held for the claimant on (date of injury). The claimant indicated that he thereafter heard from the Teacher Retirement System that, although he had 30 years service, he could not draw retirement benefits until he reached age 55, and, because he was just 50 at that time, he stated that he changed his mind about retiring. The claimant, during his testimony, said that he did not retire. Ms. K indicated that claimant did retire but within a week asked that it be rescinded. Ms. K stated that when claimant asked that his retirement be rescinded, he did not indicate

to her that his ability to perform teaching duties would be impaired or restricted.

A medical report in evidence from (Dr. C) dated February 21, 1992 indicated that Dr. C returned the claimant to limited work January 13, 1992. Dr. C projected that maximum medical improvement (MMI) from the injury would be achieved by April 4, 1992. A medical report dated May 1, 1992 from (Dr. CN) stated that claimant was examined by Dr. CN on April 28, 1992, and noted that claimant was returned to limited duty on January 13, 1992. A medical report dated May 10, 1992 from (Dr. S), an orthopedic specialist to whom claimant was referred by Dr. C, stated that the claimant "is able to perform all the activities that are outlined in the job analysis. There are no restrictions. . . ." Dr. S completed a report of medical evaluation indicating that claimant reached MMI on May 12, 1992 with a one percent permanent impairment rating.

The claimant presented a letter from (Dr. D), dated April 2, 1992, which stated that the claimant came to see him on (date of injury) and was treated that day. The letter ended with "[w]e advised him to stay off and to see that original treating physician."

There are photocopies of two work status slips in the record, both dated April 28, 1992, from Dr. CN. One states that claimant cannot return to work. The other states that claimant is able to return to limited duty work. Both slips list the date of injury as "12-9-92."

I.

WHETHER THE HEARING OFFICER WAS BOUND BY AN AGREEMENT BETWEEN THE PARTIES

At the beginning of the hearing, the hearing officer noted that the parties had reached an agreement. He recited what he believed the terms of the agreement to be: that in accordance with a bona fide offer of employment, that the claimant had disability from December 9, 1991 through February 29, 1992 and that the amount of accrued temporary income benefits (TIBS) plus interest was $2,750.00. The carrier also acknowledged that the claimant was entitled to lifetime medical benefits for treatment of his injury.

The carrier agreed, but the claimant told the hearing officer that he did not realize what the amount would be, and that he was seeking half of $6,400.00. Because $2,750.00 was less than half of this amount, he stated that he wished to pursue the hearing. The hearing officer then stated that as there was no agreement on the amount, the hearing would proceed, and the parties were given a recess to mark exhibits. Thereafter, when the hearing officer stated the issue as whether the claimant had disability for the period from (date of injury) until May 12, 1992, both parties indicated agreement.

Under these circumstances, we cannot hold that there was an agreement as to any period of disability which bound either party or the hearing officer in his determination of the issue before him. Nor did the hearing officer ignore a request of the parties to settle.

II.

WHETHER THERE IS ERROR BECAUSE CLAIMANT DID NOT KNOW OF HIS RIGHT TO COUNSEL

At the beginning of the hearing, the hearing officer informed claimant that he had a right to proceed with an attorney. We would note that the cover letter to the benefit review conference report sent to the parties also states that a party has a right to be represented by an attorney at a contested case hearing, and indicates that a party who hires an attorney should instruct that attorney to so inform the Texas Workers' Compensation Commission (Commission). While claimant stated that he did not realize before the hearing that he had this right, he indicated his intention to waive this right and proceed. Under the circumstances here, we reject this point of appeal as a basis for setting aside the decision, finding no error.

III.

WHETHER THERE WAS BIAS ON THE PART OF THE HEARING OFFICER

There is no indication in the record of either a personal relationship between the hearing officer and carrier's counsel or of any racial bias against claimant. Moreover, not only did the claimant fail to object at the hearing to any perceived bias, but at the end of the hearing commended the hearing officer for his professionalism. This point of error is rejected.

IV.

WHETHER THE EVIDENCE SUPPORTS THE HEARING OFFICER'S DECISION

TIBS are payable to an injured worker who has not reached MMI and who also has "disability." This term does not refer solely to a physical condition; disability, under the 1989 Act, means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Texas Workers' COmpensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act). In other words, it must be the injury, and not other factors, that caused diminished wages.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set

aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It is the responsibility of the hearing officer to resolve conflicting medical testimony. Texas Employers' Insurance Co. v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Taken as a whole, we believe that the evidence sufficiently supports the hearing officer's determination that the claimant's reduced wages after (date of injury), were caused by the decision to retire, and not by the work-related injury.

V.

REMAINING POINTS OF APPEAL

The recommendations of the benefit review officer are not binding on the hearing officer, nor is an asserted violation of employer's policy with regard to light duty work controlling as to the determination of the issue of disability. The hearing officer could have considered the fact that the claimant actually worked as a reading teacher before his retirement party, and that he requested reinstatement to his job after it became clear that he was mistaken in his assumption that he was eligible for retirement benefits. The hearing officer apparently determined that the preponderance of medical evidence indicated that claimant was not precluded by his injury from performing the duties of a reading teacher.

Finally, the document that claimant contends is fraudulent is a job physical demand analysis that Ms. K personally testified she created. The fact that claimant may disagree with some of the analysis does not render it fraudulent.

We affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge